89-1337

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL GARDNER,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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QUESTION PRESENTED

Does the requirement that probable cause exist to effect a warrantless arrest or to obtain a search warrant as required by the Fourth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment to the United States Constitution, and the holding of *Illinois v. Gates*, 462 U.S. 213 (1983), permit searches and seizures where no probable cause exists, where no exigent circumstances exist and where information upon which a subsequent search warrant was issued was given to the issuing Magistrate which may not have been contained within the four corners of the warrant application.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Delaware entered in the above captioned case on November 24, 1989.

CITATION TO OPINION BELOW

The opinion of the Delaware Supreme Court, which is not yet reported, is attached hereto as Appendix A.

JURISDICTION

The Delaware Supreme Court issued an opinion on November 24, 1989. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four:

The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Fourteen, Section One:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The following Delaware Statutes are involved in this case: 11 *Del.C.* §1904, §2301.

11 *Del.C.* §1904. **ARREST WITHOUT WARRANT:**

Subsection (a). An arrest by a peace officer without a warrant for a misdemeanor is lawful whenever he has reasonable ground to believe that the person to be arrested has committed a misdemeanor:

(I) In his presence;

(II) Out of his presence and without the State, and if law enforcement officers of the State where the

misdemeanor was committed request an arrest and the accused will not be apprehended unless immediately arrested;

(III) Out of his presence and within the State for the crime of shoplifting and the arrest is based upon personal investigation at the scene of arrest and where a store employee is present who has observed the activity of the person to be arrested and that person is still present; or

(IV) Out of his presence and within the State for any misdemeanor involving physical injury or the threat thereof of any misdemeanor involving illegal sexual contact or attempted sexual contact.

Subsection (b): An arrest by a peace officer without a warrant for a felony, whether committed within or without the State, is lawful whenever:

(I) He has reasonable ground to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed; or

(II) A felony has been committed by the person to be arrested although before making the arrest the officer had no reasonable ground to believe the person committed it.

11 *Del.C.* §2301. Search to Accord with Statute or Constitution.

No person shall search any person, house, building, conveyance, place or other thing without the consent of the owners (or occupants, if any) unless such search is authorized by and made pursuant to statute or the constitution of the United States.

STATEMENT OF THE CASE

On October 10, 1986 Michael Gardner was arrested by the Delaware State Police and charged with trafficking in cocaine, maintaining a dwelling for keeping controlled substances, possession of a non-narcotic schedule I controlled substance, possession of drug paraphernalia, three counts of a deadly weapon during the commission of a felony, attempted possession of trafficking in cocaine and conspiracy in the second degree.

Frank Levy was a Delaware State Police informant. Although the State Police had no direct knowledge of Gardner selling drugs from his residence, information from Levy, indicated that Gardner could be caught with "a lot of weight". Together, the State Police and Levy developed a plan which was to result in a sale of a large quantity of cocaine from Gardner to a middle man, who had no knowledge of the police involvement, commonly known as a "unwitting" informant.

Edward Krolick was approached by Levy and was asked to participate in a sale of a quarter-pound of cocaine from Gardner for the amount of $8,000.00. Krolick was to receive, as compensation for putting the deal together, one half-ounce of cocaine and $300.00 in cash.

On the morning the "deal" was to take place and at the insistence of the Delaware State Police, Levy suggested to Krolick upon his arrival at the original meeting place that the rendezvous point should be moved to a location that was closer to the Gardner residence. In addition, Levy told Krolick that instead of the agreed upon quarter-pound of cocaine, he instead wanted only one ounce of cocaine and handed Krolick $2,000.00 of State Police "buy" money to purchase the ounce. Prior to Levy meeting Krolick at the original meeting place, the State Police had placed a body-mike on Levy so that all conversations between he

and Krolick could be monitored by the State Police. Numerous officers were involved in surveillance of the Gardner residence and in trailing Krolick and Levy from the original meeting place to the second meeting place.

Krolick left Levy at the second meeting place and went to the Gardner residence. He knocked on the door and waited approximately 5 minutes with no response. He then returned to the second meeting place and indicated to Levy that no one had been at home. The two decided to wait and try again a little later.

Approximately one-half hour later, Krolick made a second trip to Gardner's house. Officers who had the residence under surveillance saw Krolick enter the house, but did not see who answered the door and could not see or hear what transpired inside the house. Once inside the house, Krolick became very nervous and told Gardner that he could not go through with any deal. Krolick immediately left the house without purchasing any drugs. He had been inside for approximately 5 minutes. Krolick was under constant surveillance from the time he left Gardner's house to the time he met Levy at the second meeting place.

Upon Krolick's return, he was greeted by Levy who immediately asked Krolick if everything was all right and if he had purchased the ounce. Although Krolick did not receive any drugs from Gardner, nor, did he observe any drugs in his house, he nevertheless responded in the affirmative. This conversation was monitored by the State Police who ordered the immediate arrest of Krolick and Levy. Although fully expecting to find the ounce of cocaine in Krolick's possession, the police only found the original $2,000.00 of "buy" money.

Based on information from the informant Levy, the State Police observations of the movements of the unwitting Krolick, and what they thought was an indication of the presence of drugs in the Gardner residence due to Krolick's

statements, one of the officers in charge of the operation called a judicial magistrate to bring him "up to date" on what was going on. This call was made immediately after the arrest of Krolick and Levy. Although this officer testified that he was unsure as to what information was actually relayed to the magistrate during the course of their telephone conversation, he recalled that the main purpose of his phone call was to see if probable cause existed for a search warrant of the Gardner residence. Although the application for the search warrant was to be based on the sale of the drugs from Gardner through the unwitting Krolick to Levy, after discussing the situation with the officer, the magistrate stated "let's go with it". As soon as the conversation with the magistrate ended, the police secured the house and arrested Gardner who had been outside of his residence. This arrest took place approximately ten minutes after the arrest of Krolick and Levy.

The Gardner residence was seized at approximately 1:30 p.m. by thirteen police officers. The house was immediately checked by a SWAT team for other persons in the residence with negative results. Gardner was read his Miranda warnings when he was arrested and was held inside his house by three police officers after it was secured while a warrant was being prepared.

The warrant included certain stale information about a previous drug sale that took place at the Gardner residence some fifteen months prior to the Gardner arrest, admittedly at a time when Gardner's wife resided there. The only corroboration relied upon by the police that drugs could be found in the Gardner residence was the false statement made by Krolick upon his second return to the meeting area when he met Levy. In addition, the police admittedly relied upon Krolick's second trip to the Gardner residence as independent corroboration.

After the warrant was signed approximately three hours after the initial seizure, the officers holding Gardner and his residence were notified that the search could begin. At this time Gardner was asked if any drugs were located in the residence and he pointed to a bag which was hanging on a railing. The bag was seized from the corner banister in the living room and was found to contain a white powdery substance. A further search of the residence yielded a Smith & Wesson .44 magnum revolver which was found in the master bedroom in the top drawer of a night stand located next to the bed. Other firearms were found on the second floor of the house. Scales and other paraphernalia were found in the basement.

New Castle County Grand Jury returned an indictment against the Petitioner on November 12, 1986 for the charges of Trafficking in Cocaine, 16 *Del.C.* §4753A(a)(2), Maintaining a Dwelling For Keeping Controlled Substances, 16 *Del.C.* §4755(a)(5), Possession of A Non-Narcotic Schedule I Controlled Substance (Marijuana), 16 *Del.C.* §4754, Possession of Drug Paraphernalia, 16 *Del.C.* §4771, and Possession of a Deadly Weapon During the Commission of a Felony (3 Counts), 11 *Del.C.* §1447.

A Motion to Suppress evidence was filed on January 9, 1987. A Suppression hearing was held immediately prior to trial on March 7, 1988. Upon consideration of the testimony presented by the State, the Superior Court denied Gardner's Motion to Suppress. (Appendix B).

REASONS FOR GRANTING THE WRIT

I. This Case Presents an Important Question Involving the Requirement of the Existence of Probable Cause to Effect an Arrest Without a Warrant as Required by the Fourth Amendment to the United States Constitution as Applied to the States Through the Fourteenth Amendment of the United States Constitution.

In *Gardner v. State*, Del. Supr., — A. 2d — 1989), the Delaware Supreme Court held that the search warrant obtained by the Police was properly issued and that the warrant affidavit clearly contained, within its "four corners", sufficient information upon which probable cause could be established. In addition, while not condoning the informal discussions between the police officer and the Magistrate in connection with the issuance of the search warrant, the Court did not feel that this informality effected the underlying validity of the search warrant.

In order for a warrantless arrest to be upheld, the State has the burden of establishing that the arresting officers had probable cause to believe that Gardner had committed a felony. 11 *Del.C.* §1904(b). "Reasonable grounds" as used in 11 *Del.C.* §1904 has been interpreted as meaning "probable cause". *United States ex rel. mealey v. Delaware*, 352 F.Sup. 349 (D.Del. 1972).

In *Illinois v. Gates*, 462 U.S. 213 (1983), this Court held that an informant's tip may form the basis of probable cause where the "totality of circumstances" would lead a neutral and detached Magistrate to conclude that the information is reliable. The former two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), required a showing of both (1) the basis for the informant's knowledge, and (2) facts sufficient to establish either the informant's veracity or the reliability of the information supplied. Under *Gates*, if the informant's

tip can be corroborated, it may form the basis for probable cause even though nothing is known about the informant's credibility. *Illinois v. Gates*, supra. 462 U.S. at 242-243.

In *Gardner*, the Delaware Supreme Court found that the legal standard for the securing of a search warrant and the warrantless arrest were essentially the same and reviewed the totality of the circumstances perspective in evaluating the warrantless arrest and the search warrant affidavit. In doing so, it "eschewed a hypertechnical approach to the evaluation of the search warrant affidavit in favor of a common sense interpretation, bearing in mind that the Court reviewing the search warrant owes a certain degree of deference to issuing Magistrate". *Gardner, supra.* at _____.

A "totality of circumstances" review in *Gardner* indicated that the State was unable to establish that the informant Levy or the unwitting informant Krolick were reliable, confidential informants and had provided reliable information in the past. No corroboration can be found which would legitimize the State's reliance on the comments by Krolick regarding the purchase of drugs or the existence of drugs in Gardner's house.

The information, relied upon by the State in *Gardner*, to establish the existence of probable cause can be found in the warrant application. In that affidavit, the investigating officers cite information received from two confidential informants in 1984 indicating that some drug activity was taking place at the Gardner residence on a continuing basis. The reliability of those informants has never been established. In addition, the police noted a controlled purchase of drugs made from the Gardner residence in July of 1985. Nowhere in the probable cause sheet or anywhere in the record below is there any indication that Gardner was personally involved in that purchase. Also, the date of the

alleged purchase was some fifteen (15) months prior to Gardner's arrest. The officers also relied on confidential tips from Crime Stoppers which referred to the distribution of cocaine from the Gardner residence in December of 1985. Once again, the reliability of this tip has never been established. The probable cause sheet goes on to describe in limited detail the "controlled purchase" that was to take place between Krolick and Gardner. Krolick's first trip to Gardner's residence as well as the second trip, were specific items relied upon in the affidavit by the police. The last item relied upon by the police was the alleged statement by Krolick, that in essence the deal was done and the "stuff is there". Gardner was also observed standing in front of his residence and "that [he] was waiting to leave, but appeared to be looking for someone to come to the house". These allegations constitute the sum total of all of the information relied upon by the police officers in establishing probable cause to arrest Gardner outside of his residence and in securing the subsequently obtained search warrant. In reviewing these allegations, the Trial Court found this information to be persuasive and denied Gardner's Motion to Suppress Evidence.

Absolutely no support can be found anywhere in the record below for the suppositions and conclusions made by the police. The investigating officers admitted that they did not know who had admitted Krolick in to the Gardner residence. More importantly, they were also *unsure* as to the exact words spoken by Krolick upon his second return to the rendezvous point.

II. The Decision Below is Incorrect.

The *Gardner* Court found that the suppositions relied upon by the police, coupled with the police observation that Gardner appeared to be waiting for someone's return estab-

lished probable cause under a totality of circumstances analysis even though the police had reason to doubt Krolick's reliability in his indication that drugs existed in the Gardner residence:

> "While it is true that the plan went awry because of Krolick's failure to participate in a two-part drug purchase, his statement, overheard by police, that the drugs were present on the premises was consistent with the police design to arrest Krolick after he had completed the first part of the transaction. It was only after Krolick was arrested and the $2,000 purchase money was found on his person *that the police had reason to doubt his basis for believing that drugs were on the premises*. At that time, however, the police were aware that Gardner appeared to be waiting for Krolick's return, which suggested that Gardner understood that a second or completed transaction would occur upon Krolick's return." *Gardner, supra.* at _____. (emphasis added).

The *Gardner* Court incorrectly relies upon the State's description of the drug transaction as a "two-part deal". A review of the trial transcript, clearly indicates that there was *no* two-part transaction plan. It was the police who changed the original plan on the very day of the transaction. At their insistence, Levy suggested to Krolick when they first met on the morning that Gardner had been arrested, that not only the rendezvous point be moved to a location closer to the Gardner home, but also that the amount of the purchase was not to be a quarter-pound, but merely one once of cocaine.

A reading of the trial testimony of the State's witnesses clearly indicates that its characterization of the attempted drug transaction as a "two-part deal" is erroneous.

Equally erroneous is the *Gardner* Court's finding that Gardner's presence outside his home in some way established corroboration for either the State's reliance on Krolick's statement that the "stuff was there" or that Gardner was waiting for someone to return. Clearly, the *Gardner* Court was incorrect in upholding the Trial Court's denial of Gardner's Motion for Suppression. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939).

The *Gardner* Court further held that Gardner's immediate arrest was also justified by exigent circumstances. The Court found that:

> "[t]he reasonable belief that guns and drugs were present in the residence suggested not only that evidence might be destroyed but also that the safety of the police might be endangered if Gardner were permitted to enter the residence while the police awaited the arrival of the search warrant. While the State has the burden of proving exigency, 'the criterion is the reasonableness of the belief of the police as to the existence of an emergency, not the existence of an emergency in fact.' *Patrick v. State*, Del. Supr., 227 A. 2d 486, 489 (1967). It does not appear the Gardner's arrest was a pre-text to gain access to the residence in order to conduct a warrantless search. No there is no indication that Gardner's arrest or the subsequent security sweep of his residence resulted in the discovery of any drugs. It was only after the officers detaining Gardner were informed that the search warrant had been issued, that the drugs were found." *Gardner, supra.* at _____.

This Court has held that police cannot create their own exigent circumstances. *United States v. Sequra*, 468

U.S. 796 (1984). In essence, in order to justify a warrantless entry based on imminent destruction of evidence, factual circumstances must demonstrate a sufficient basis for an officer to believe that somebody in the residence will likely destroy that evidence. *United States v. Beck*, 662 F. 2d 527 (8th Cir. 1981). In other words, mere fear or apprehension alone that evidence *may* be destroyed will *not* justify the warrantless entry of a private home. *United States v. Perez*, 700 F. 2d 1232 (8th Cir. 1983), cert. denied, 468 U.S. 1217 (1984).

The conclusion of the police that evidence was in imminent danger of destruction is not supported by any facts in the record below. Indeed, when asked what exigent circumstances existed upon which a warrantless arrest and immediate seizure of the Gardner home was based, the chief investigating officer indicated that "we had knowledge that Gardner was involved in drugs. The scenario was set up that Krolick was going to go to Gardner's residence and get the drugs. He came back, and told Levy that the drugs were there, and we did not want to lose them, so we secured the residence." Nowhere can the police point to any information which led them to believe that there was an imminent danger of the destruction of the contraband that Krolick had indicated was inside the Gardner residence. In fact, a search of Krolick after he had made the statement relied upon by the police, indicated that he had not made the purchase and that he had just made a knowingly fictitious statement. The police, therefore, could not reasonably rely, on any information he had given to them with respect to Gardner or the presence of drugs in the Gardner residence.

In addition, the police have never indicated that they suspected that anyone other than Gardner was in the Gardner residence. In fact, Gardner himself, was seen outside of the residence. Neither Gardner's wife, nor her vehicle had

been seen at the residence all day. No one else had been seen entering or leaving the residence. The police had started their surveillance of the residence early in the morning. The police, therefore, had no reasonable foundation for the belief that contraband was actually located in the residence since no drug transaction had occurred as planned, or in the alternative, that even if cocaine had been present in the house, that there was any threat of the imminent destruction or removal of that evidence. Gardner was arrested by thirteen Police Officers outside of his residence and nothing in the record below indicates that there was anyone inside the house. The investigating officer's explanation as to what constituted exigent circumstances amounted to nothing more than unfounded belief and supposition based entirely on the untruthful statements of Krolick.

In discussing the role of the Magistrate, the *Gardner* Court found that the Magistrate who issued the search warrant had not abandoned his role as a neutral and detached Magistrate even though he had discussed the basis for the search warrant with one of the detectives prior to the presentation of the written affidavit. The Court held:

> "While it may be necessary for police officers seeking to secure a warrant to initiate contact with a Judge or Magistrate to determine the latter's availability to receive the written application required by 11 *Del.C.* §2306, the knowledge of the issuing Judge must be limited to facts contained within the affidavit. *Pierson v. State*, 338 A. 2d at 573. Thus, we do not condone informal discussions between the police and a Judge or Magistrate in connection with the issuing of search warrants, except to the extent that they may be necessary for logistical purposes. Not only

do such discussions create the risk that the Magistrate will become privy to extraneous information, but they also cast out on the detachment of the Judicial Officer. A Judge may not treat the search warrant process as a collaborative effort between the Judiciary and the police. While a search warrant application is, of necessity, an *ex parte* proceeding, it is nonetheless a Judicial proceeding. The Judge or Magistrate must maintain an impartiality and not ally himself with one party.

Notwithstanding our disapproval of the informality evident in the Magistrate's discussion [with the police officer] in this case, we do not believe that this lapse affected the underlying validity of the search warrant. The test for determining the establishment of probable cause is applied when the evidence seized under the warrant is subject to a Motion to Suppress. At that time 'sufficient facts must appear on the face of the affidavit so that a Magistrate's personal knowledge, notwith standing, a reviewing Court can verify the existence of probable cause.' *Pierson v. State*, 338 A. 2d at 573. Thus, in the affidavit, within its four corners, establishes probable cause for the issuance of a search warrant to the satisfaction of Superior Court and of this Court on review, the subjective beliefs or attitude of the issuing Magistrate will not invalidate the warrant." *Gardner, supra.* at _____ .

The deference afforded a Magistrate's finding of probable cause is not boundless and does not preclude inquiry in to the knowing or reckless falsity of the affidavit on which the determination was based. *Franks v. Delaware*,

438 U.S. 154 (1978). Reviewing Courts must insist that the Magistrate purport to "perform his neutral and detached function and not serve merely as a rubber stamp for the police". *Aguilar v. Texas, supra.* Further, a Magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1929). Sufficient information must be presented to the issuing Magistrate to allow an official to determine probable cause, in other words, his action cannot be a mere ratification of the bare conclusions of others. Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing Court may properly conclude that notwithstanding the difference that Magistrates deserve, the warrant was invalid because the Magistrate's probable cause determination reflected an improper analysis of the totality of the circumstances. *Illinois v. Gates, supra.*

The "neutral and detached" Magistrate requirement is not supported by the record below. Clearly, a neutral and detached Magistrate must review the facts contained within the four corners of the warrant application and make a determination of whether probable cause exists based on the information contained therein. In *Gardner* a police officer contacted the Magistrate by telephone, discussed the situation for a period of time, and obtained the opinion of the Magistrate that there was sufficient probable cause to issue a warrant. The police officer involved could not remember the substance of the conversation with the Magistrate but believed that the same Magistrate issued the warrant. After bringing the Magistrate "up to date" the Magistrate stated, "let's go with it". Based on that indication, the

police officer ordered the arrest of Gardner and the seizure of his home.

The Magistrate's response of "let's go with it" seems to indicate something more than the required detached and objective judicial officer's review or assessment of the situation. In addition, the State cannot establish that the Magistrate's determination of probable cause for the subsequently obtained search warrant was made exclusively on the information contained within the four corners of the warrant application and not influenced in some way by the information provided to him during the course of the telephone conversation with the police officer.

In addition, there is no provision for a telephonic application for a search warrant as in the Federal Rules of Criminal Procedure.* Although the *Gardner* Court disap-

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* Federal Rules of Criminal Procedure - Rule 41 (2)

(2) Warrant upon Oral Testimony.

(A) General Rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance. If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

proved of the informality evident in the Magistrate's discussion with the officer, it did not find that "this lapse affected the underlying validity of the search warrant". To so hold, emasculates the constitutional requirement that a warrant not be issued unless a neutral and detached Magistrate can determine probable cause based on facts contained within the four corners of the warrant application and not on information contained in a casual telephonic conversation with a police officer.

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* Federal Rules of Criminal Procedure - Rule 41 (2)
(Continued from previous Page)

(D) Recording and Certification of Testimony. When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribe, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the Court.

(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional Rule for Execution. The person who executes the warrant shall enter the exact time of execution on the fact of the duplicate original warrant.

(G) Motion to Suppress Precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

CONCLUSION

To answer the question left open by the *Gardner* Court as to whether a warrantless arrest and seizure, based upon facts which do not constitute probable cause or exigent circumstances, will be upheld where improper police conduct in contacting an issuing Magistrate create doubt as to whether the warrant was issued on information found solely within the four corners of the warrant affidavit, the Petitioner submits the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NORMAN A. AERENSON

APPENDIX A.

IN THE
SUPREME COURT OF THE STATE
OF DELAWARE

No. 113, 1988

MICHAEL GARDNER,
Defendant Below,
Appellant,

v.

STATE OF DELAWARE,
Plaintiff Below,
Appellee.

Submitted: June 6, 1989
Decided: November 24, 1989

Before CHRISTIE, *Chief Justice*, HORSEY, MOORE, WALSH and HOLLAND, *Justices*, constituting the Court *en banc*.

Appeal from Superior Court. Affirmed in Part and Reversed in Part.

Louis B. Ferrara, Esquire, (argued), Aerenson, Ferrara & Lyons, Wilmington for appellant.

Richard E. Fairbanks, Jr., Esquire (argued), Chief of Appeals Division and Timothy J. Donovan, Jr., Esquire, Deputy Attorney General, Department of Justice, Wilmington, for appellee.

The appellant, Michael Gardner ("Gardner"), appeals from his conviction in the Superior Court on charges of trafficking in cocaine, possession of drug paraphernalia, maintaining a dwelling for keeping controlled substances and one count of possession of a deadly weapon during the commission of a felony. These charges arose out of the seizure of drugs and weapons at Gardner's residence near Newark on October 10, 1986. Gardner claims that the evidence seized at his home should have been suppressed because the search warrant was not supported by probable cause and not issued by a neutral magistrate. He also alleges error in an improper discovery response by the State and the lack of a sufficient nexus between the weapon seized and the underlying drug felony. We conclude that the search warrant was properly issued in this case and that there was no discovery violation by the State. We also conclude, however, that the State failed to establish the required evidentiary nexus between the weapon and the predicate felony. Accordingly, we affirm the conviction on the drug charges but reverse as to the weapon charges.

I

Gardner had been the subject of police interest and suspicion for several months preceding his arrest on October 10, 1986. In July, 1985, a controlled purchase of cocaine was made from Gardner's residence through a police informant. Police had earlier received information that drug sales were taking place at the Gardner residence, with drug shipments arriving from New York, usually on Thursdays and Fridays. In December, 1985, information received from Crime Stoppers, a telephone reporting service for public complaints of criminal activity, pointed to continued drug distribution from the residence. In Sep-

tember, 1986, a confidential informant reported to police that both Gardner and his wife, Wendy, were dealing in large quantities of drugs from their home.

The specific events that led to the seizure of drugs at Gardner's home on October 10 began with the arrest of David Levy ("Levy") on drug charges in April, 1986. Because of the seriousness of the charges against him, Levy agreed to become a police informant and assist in the arrest and conviction of individuals selling drugs. In exchange for his cooperation, Levy was promised a reduction in charges and a favorable sentencing recommendation. Levy agreed to participate in a controlled drug purchase from Gardner, but because Levy believed that Gardner might be aware of Levy's arrest and thus be suspicious of him, it was agreed that Levy would act as an indirect purchaser through an intermediary, or middleman. The direct purchase from Gardner was to be made by Edward Krolick ("Krolick"). Levy had been supplying drugs to Krolick, who also knew Gardner. Krolick, who had no knowledge of police involvement, thus became an unwitting informant.

Pursuant to the police-designed plan, Levy approached Krolick with the request that Krolick arrange to purchase a quarter pound of cocaine from Gardner at the latter's residence for $8,000. The plan called for a two-part transaction: Krolick would buy one ounce of cocaine for $2,000, advising Gardner that if the drugs were satisfactory to his purchaser Krolick would return to complete the transaction. When Krolick delivered the initial drugs to Levy, Krolick was to be arrested. Then the police would secure a search warrant to seize the remaining drugs and arrest Gardner.

Although Krolick was told he would receive $300 and $1,000 worth of cocaine for acting as the middleman, he

was reluctant to participate, primarily because he would be twice exposed to the danger of arrest. In order to eliminate the sampling phase of the deal, Krolick visited Levy the day before the proposed transaction to deliver a small quantity of cocaine which, Krolick claimed, came from Gardner. Levy insisted, however, that the deal proceed as planned the next day.

On the morning of October 10, 1986, Levy met Krolick outside of Wilmington. Levy had been fitted with a body wireless transmitter that permitted the police to monitor his conversations. Levy suggested to Krolick that they meet again at a shopping center outside Newark, closer to Gardner's house. Under constant surveillance by the police, who were also watching Gardner's residence, Levy and Krolick proceeded in separate vehicles to the University Plaza Shopping Center. At the shopping center Levy gave Krolick $2,000 for the initial purchase. Krolick again expressed reluctance at the two part transaction and requested the entire $8,000 for a single deal. Levy, who had only the $2,000 supplied him by the police, insisted on the original plan. Krolick then drove to Gardner's house arriving near noon. After knocking and receiving no response, he left to rejoin Levy at the shopping center. Krolick's actions were observed by surveilling police. Krolick and Levy than had lunch while waiting for Gardner's return.

Krolick returned to Gardner's residence near 1:00 p.m., knocked and on this occasion was admitted. He emerged from Gardner's house a few minutes later and proceeded to rendezvous with Levy. Police officers, monitoring the conversation, heard Levy ask Krolick if he had the drugs and when Krolick replied in the affirmative, the police immediately moved in and arrested Krolick. When Krolick was searched, however, the police found the

initial $2,000 but no drugs. Krolick refused to answer any questions and demanded a lawyer.[1]

After Krolick had been taken into custody, the police officers who were conducting a surveillance of the Gardner residence observed Gardner pacing back and forth in front of the house. The police assumed that Gardner was waiting for Krolick's return to complete the transaction—a scenario that seemed reasonable in view of Krolick's reluctance to do a two-part transaction and the fact that he obviously had not carried out the initial purchase since he still had the $2,000 on his person when arrested. The police decided to act quickly since they feared that Gardner would not wait for an extended period of time for Krolick's return.

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[1]Krolick described his conversation with Levy as follows:

Q. Tell the jury in detail what you recall doing and the conversation that ensued when you met Levy back at the University Plaza.

A. Okay, I went back to talk to Frank and trying to figure a way to explain it to him that I couldn't do this for him. And I'm sitting, driving over there, and what came to my head was, do it like good news and bad news type thing. The good news is the stuff is there, Frank; the bad news is, you have to get somebody else to get it.

I got part of that out, and Frank had to get gas in my truck. It was running right on "E". And I tried to get Frank to get in the truck, and he kept asking, "Do you have it? Do you have it?" And I shook my head yeah, and I said, "Yeah." And that's when I got arrested.

Q. Did you have the opportunity to say anything else to Frank Levy?

A. No. Just good news, the stuff's there, and I said—he asked me, "Do you got it?" And I said, "Yeah." I didn't get to finish my sentence.

In view of the pace at which events were developing, Detective Pulling, the officer in charge of the operation, decided to arrest Gardner immediately and then secure a search warrant to search the residence. Pulling first telephoned a Justice of the Peace and related the history of drug activity at Gardner's residence and the events that had taken place that day. Pulling was advised by the Justice of the Peace that probable cause existed for a search warrant[2] and another officer proceeded to complete a written application for a search warrant. The affidavit to the application had already been partially drafted to include the background of the drug activity at Gardner's residence. Pulling also ordered Gardner's immediate arrest by a special SWAT team that had been stationed nearby. The presence of the SWAT team on standby status was occasioned by information that Gardner might have an array of weapons in the residence. Gardner was promptly arrested outside his residence and kept under guard inside the house, which was also subjected to a security search for the presence of weapons. Three officers remained in the residence with Gardner, who had been given his *Miranda* rights, to await the arrival of the search warrant. Although Gardner had been searched incident to his arrest, no particularized search of the residence occurred prior to the execution of the search warrant. When the search warrant had been signed by the Justice of the Peace, that fact was communicated by telephone to the officers at Gardner's residence. One of the detaining officers then asked Gardner if there were any drugs in the residence. Gardner pointed to a bag hanging on a stair railing. The bag was seized and found to contain over three ounces of cocaine. A full search of the house ulti-

[2]Pulling testified that "the magistrate told me no problem whatsoever, let's go with it."

mately revealed a revolver in the top drawer of a night stand in the master bedroom, other firearms on the second floor, and scales and drug paraphernalia in the basement.

Prior to trial, Gardner moved to suppress the seizure of the drugs and guns on the grounds that his warrantless arrest was unjustified by exigent circumstances and that the subsequent search of his residence was based on a search warrant that issued without probable cause. The trial court denied suppression and Gardner was subsequently convinced of both the drugs and weapon offenses. On appeal Gardner renews his attack on the legality of the arrest and search. He also complains of the alleged failure by the State to provide adequate discovery and the lack of a sufficient evidential nexus between the drug convictions and the weapon charge.

II

Gardner's appeal from the suppression ruling is three-pronged. First, he contends that his arrest outside the residence was unsupported by probable cause or exigent circumstances. He also argues that the affidavit executed by police in support of the search warrant application lacked sufficient corroborated facts to justify the issuance of the warrant. Finally, Gardner asserts that the Justice of the Peace, in orally approving the police recital of the facts underlying the affidavit, abandoned his role as a detached and neutral magistrate and the search warrant thus issued without an objective determination that it was justified.

Theoretically, Gardner's motion to suppress is directed against two distinct areas of police conduct, the warrantless arrest and the warrant-authorized search of the premises. Nevertheless, the factual basis for the claim is essentially the same. The events that the police viewed as establishing probable cause for the securing of a search

warrant, the history of drug dealing at Gardner's residence, and the circumstances of Krolick's arrest were all considered by the police to support their decision to arrest Gardner while he was pacing outside his residence. Gardner argues that the evidence of past drug dealing was based on unreliable or stale information and that when viewed in light of the unsuccessful efforts of the unwitting informant, the evidence provides no basis for a finding that probable cause existed. To the contrary, the State contends that upon Krolick's arrest the police had the necessary verification to justify their belief that drugs were at the Gardner residence. That evidence was sufficient, the argument runs, both to secure a search warrant and immediately to arrest Gardner to prevent him from destroying the drugs or gaining access to weapons believed to be in the residence.

The authority for a warrantless arrest is statutorily defined under Delaware law. 11 *Del.C.* § 1904 permits a peace officer to arrest without a warrant for a felony whenever "he has reasonable ground to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." The term "reasonable ground" has been deemed the evidentiary equivalent of "probable cause." *Thomas v. State*, Del. Supr., 467 A.2d 954 (1983). Thus, in this case the legal standard for the securing of the search warrant and the warrantless arrest are the same. *Coleman v. State*, Del. Supr., 562 A.2d 1171, 1177 (1989) and *Thompson v. State*, Del. Supr., 539 A.2d 1052, 1055 (1988). Moreover, the prospect that Gardner would have access to weapons if allowed to enter his residence added an element of exigency to his warrantless arrest. In any event, Gardner rests his claim in both areas on the asserted lack of probable cause.

In *Illinois v. Gates*, 462 U.S. 213 (1983), the United States Supreme Court rejected the previously established two-faceted test of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) (affidavit must establish (1) the informant's basis of knowledge or (2) provide sufficient facts to establish either the informant's veracity or the reliability of the informant's report) in favor of a "totality of the circumstances" standard for the issuance of search warrants. The Court viewed the rule from the perspective of the magistrate or judge presented with a request for a search warrant:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the mgaistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed. *Jones v. United States*, 362 U.S., at 271, 80 S.Ct., at 736. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.

462 U.S. at 238-39.

The Court also noted that a totality of circumstances approach is not only more consistent with prior decisional treatment of the concept of probable cause but also a more "practical, nontechnical" concept. *Id.* at 231. In particular the Court emphasized that the "assessment of probabilities" that flows from the evidence presented in support of the warrant "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.* at 232 (quoting from *United States v. Cortez*, 449 U.S. 411, 418 (1981).

This Court has also eschewed a hypertechnical approach to the evalutaion of the search warrant affidavit in favor of a common-sense interpretation, bearing in mind that the court reviewing the search warrant owes a certain degree of deference to the issuing magistrate. *Tatman v. State*, Del. Supr., 494 A.2d 1249, 1251-52 (1985) and *Jensen v. State*, Del. Supr., 482 A.2d 105, 111 (1984). While this Court has had no specific occasion to apply the totality of circumstances standard announced in *Gates*, we recognize its compelling force and find it consistent with our holding in *Jensen* that the affidavit supporting the search warrant must be "considered as a whole and not on the basis of separate allegations." *Id.* at 111.

When viewed from a totality of the circumstances perspective, the search warrant affidavit clearly contained, within its "four corners," information from which one could conclude that it was more than merely probable that Gardner had been engaged in drug transactions at his residence and the drugs were likely to be on the premises on October 10, 1986. The affidavit recites a two-year history of drug dealing at the Gardner residence, including evidence of a direct controlled buy and various reports from police officers and anonymous sources. Although the most recent report of drug activity at the residence, prior to the Krolick-Levy transaction, occurred in December, 1985, Gardner continued to occupy the residence in the interim and by September of 1986, Levy, then an informant, had confirmed the continuance of drug dealing.

Gardner contends that the failure of Krolick, the unwitting informant, to purchase drugs as planned, renders his participation in the plan not credible and thus not corroborative of the presence of drugs at the residence. While it is true that the plan went awry because of

Krolick's failure to participate in a two-part drug purchase, his statement, overheard by police, that the drugs were present on the premises was consistent with the police design to arrest Krolick after he had completed the first part of the transaction. It was only after Krolick was arrested and the $2,000 purchase money was found on his person that the police had reason to doubt his basis for believing that drugs were on the premises. At that time, however, the police were aware that Gardner appeared to be waiting for Krolick's return, which suggested that Gardner understood that a second or completed transaction would occur upon Krolick's return. In view of the long history of drug activity at the Gardner residence, including the information that drugs were usually received by Gardner on Thursdays or Fridays (October 10 was a Friday) the truncated events of October 10 were important only insofar as they verified the presence of drugs on the premises on that date. The aborted participation of Krolick, including his statements before arrest, coupled with Gardner's appearance of continued involvement in completing the drug sale, provided the necessary elements, under a totality of circumstances analysis, to establish probable cause for the issuance of the search warrant and Gardner's warrantless arrest.

In addition to being supported by probable cause, the immediate arrest of Gardner was also justified by exigent circumstances, The reasonable belief that guns and drugs were present in the residence suggested not only that evidence might be destroyed but also that the safety of the police might be endangered if Gardner were permitted to enter the residence while the police awaited the arrival of the search warrant. While the State has the burden of proving exigency, "the criterion is the reasonableness of the belief of the police as to the existence if an emergency,

not the existence of an emergency in fact." *Patrick v. State*, Del. Supr., 227 A.3d 486, 489 (1967). It does not appear that Gardner's arrest was a pretext to gain access to the residence in order to conduct a warrantless search. There is no indication that Gardner's arrest or the subsequent security sweep of his residence resulted in the discovery of any drugs. It was only after the officers detaining Gardner were informed that the search warrant had been issued that the drugs were found.

Gardner argues that the information in the affidavit detailing the two-year history of drug activity at Gardner's residence is stale since there was a hiatus between the December, 1985 anonymous tip and the October 10 transaction. This Court has held that where staleness is alleged, "the test of temporal proximity is determined on an *ad hoc* basis in the light of circumstances of each case." *Jensen v. State*, 482 A.2d at 111. Where the evidence sought to be seized is subject to deterioration or change because of the passage of time or where contact between the evidence sought be be seized and the defendant is remote, historical information in the search warrant may be viewed as not establishing a current probability. Time is a critical element because probably cause must be based on current information. *Pierson v. State*, Del. Supr., 338 A.2d 571, 573 (1975). Here, however, the location of the alleged drug activity never changed during the two-year period of suspicion. Moreover, the police established through the check of public utility records that Gardner continued to occupy the premises at the time the Krolick-Levy plan was arranged. Finally, the continuing regularity of drug shipments to Gardner, together with Gardner's presence at his residence on October 10, demonstrates the probability that his drug activity persisted through the date of the search warrant application. We find no merit in the staleness argument.

We next address Gardner's contention that the Justice of the Peace who issued the search warrant abandoned his role as a neutral and detached magistrate by discussing the basis for the search warrant with Detective Pulling Prior to the presentation of the written affidavit. Gardner contends that the magistrate's discussion with the police officer and his comment "Let's go with it" indicates a lack of impartiality that vitiates the warrant.

The requirement that a judicial officer to whom an application for a search warrant is presented assume an impartial role is essential to the maintenance of the constitutional protection against unreasonable searches. *United States v. Leon*, 468 U.S. 897, 914 (1984); *Johnson v. United States* 333 U.S. 10, 14 (1948). While it may be necessary for police officers seeking to secure a warrant to initiate contact with a judge or magistrate to determine the latter's availability to receive the written application required by 11 *Del. C.* § 2306, the knowledge of the issuing judge must be limited to facts contained within the affidavit. *Pierson v. State*, 338 A.2d at 573. Thus, we do not condone informal discussions between the police and a judge or magistrate in connection with the issuance of search warrants, except to the extent that they may be necessary for logistical purposes. Not only do such discussions create the risk that the magistrate will become privy to extraneous information, but they also cast doubt on the detachment of a judicial officer. A judge may not treat the search warrant process as a collaborative effort between the judiciary and the police. While a search warrant application is, of necessity, an ex parte proceeding, it is nonetheless a judicial proceeding. The judge or magistrate must maintain his impartiality and not ally himself with one party.

Notwithstanding our disapproval of the informality evident in the magistrate's discussion with Detective Pulling in this case, we do not believe that this lapse affected the underlying validity of the search warrant. The test for determining the establishment of probable cause is applied when the evidence seized under the warrant is subject to a motion to suppress. At that time "sufficient facts must appear on the face of the affidavit so that a magistrate's personal knowledge notwithstanding, a reviewing Court can verify the existence of probable cause." *Pierson v. State*, 338 A.2d at 573. Thus, if the affidavit, within its four corners, establishes probable cause for the issuance of a search warrant to the satisfaction of the Superior Court and of this Court on review, the subjective beliefs or attitude of the issuing magistrate will not invalidate the warrant. Since we have previously concluded that the information presented in the written affidavit, when viewed under a totality of circumstances test, established probable cause for the issuance of the search warrant, the magistrate's prior involvement is not fatal to the search warrant.[3]

III

Gardner's next claim of error is directed to the trial court's refusal to suppress, or alternatively, grant a mistrial because the existence of a secretly-recorded taped statement of Gardner had not been disclosed prior to trial.

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[3]Our ruling validating the search warrant under a totality of circumstances test renders unnecessary consideration of the State's alternative argument, premised upon *United States v. Leon*, 468 U.S. 897 (1984), that evidence seized by the police in justifiable reliance upon a technically defective search warrant is admissable. Accordingly, we express no opinion upon that question.

The trial judge permitted the State to offer this evidence on the ground that it had not been obtained by a State agent nor was it otherwise discoverable before trial.

Krolick, the unwitting informant, had been indicted as a co-defendent with Gardner. On the first day of trial, Krolick entered a guilty plea on charges of conspiracy and drug possession and agreed to testify on behalf of the State. After the entry of this guilty plea, the State learned for the first time that Krolick, on the advice of his counsel, had surreptitiously recorded certain conversations with Gardner during the period between arrest and trial. Gardner's statements were incriminating and the State proposed to use them at trial. When the tapes were turned over to the prosecutor, he immediately notified Gardner's counsel of their existence and made them available for listening. After hearing the tapes, Gardner's counsel promptly moved for their suppression.

Gardner contends that the State failed to comply with Superior Court Criminal Rule 16 (which requires, *inter alia*, disclosure of pretrial statements made by a defendant) by not making a diligent effort to determine whether such incriminating evidence existed. We agree with the State, however, that Rule 16(a)(1) requires disclosure and production of a defendant's statement only if it is (1) made in response to interrogation by a person known to the defendant to be a state agent and (2) known to be within the possession, custody or control of the State.[4] Gardner

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[4]RULE 16. DISCOVERY AND INSPECTION

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. The defendant may serve upon the Attorney General a request to permit the defendant or someone acting in his behalf to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or a co-defendant (whether or not

concedes that at the time Krolick made the tape recordings, he was not an agent of the State. Even if, arguably, he might be deemed a State agent upon agreement to testify as a State's witness, the obligation to produce the statement arose only when the State became aware of its existence. There is no contention that the State did not act promptly in advising Gardner's counsel of the tapes and offer access to them. Clearly, there was no lack of good faith on the part of the State in complying with its discovery obligation under Rule 16.

Gardner also argues that he was entitled to production of the tapes as *Jencks* material. *Jencks v. United States*, 353 U.S. 657 (1957). While it is questionable whether statements made to non-state agents are subject to *Jencks* production, *Hooks v. State*, Del. Supr., 416 A. 2d 189, 200 (1980), the duty to provide a witness' statement does not arise until the witness is tendered for cross-examination. *Id.* at 200. Moreover, there is no requirement that *Jencks* material be identified in the pretrial discovery undr Rule 16. *Rose v. State*, Del. Supr., 542 A.2d 1196, 1198-99 (1988).

We find no error in the trial court's refusal to suppress Gardner's taped statement to Krolick nor in its refusal to grant a mistrial.

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charged as a principal, accomplice or accessory in the same or in a separate proceeding), or copies thereof, and the substance of any oral statement which the State intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by the person then known to the defendant to be a state agent which are known by the Attorney General to be within the possession, custody or control of the State.

IV

At the time of Gardner's arrest and the execution of the search warrant, police discovered several weapons in various locations in Gardner's residence: the garage, an attic hallway and in Gardner's bedroom. He was subsequently indicted on three separate counts of possession of a deadly weapon during the commission of a felony (trafficking in cocaine) for three weapons found in his bedroom: a revolver located in a drawer of a night stand and a rifle and shotgun found elsewhere in the room. The jury convicted Gardner of the weapons offense involving the revolver found in the night stand but were unable to reach a unanimous verdict as to the remaining weapons charges. Gardner now contends that the evidence was insufficient to establish that the weapon found in the night stand was "possessed" by him while committing the offense of trafficking in cocaine.

In order to secure a conviction for possession of a deadly weapon during the commission of a felony as proscribed by 11 *Del.C.* § 1447,[5] the State is required to establish that at the time he was engaged in the designated predicate felony the defendant had a deadly weapon "physically available or accessible to him." *Mack v. State*, Del. Supr., 312 A.2 319, 322 (1973). In *Mack*, a weapons conviction was upheld where the evidence indicated that a loaded gun was found in the defendant's bedroom, where drugs and paraphernalia were also found. In *Wilson v.*

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[5] § 1447. Possession of a dealy weapon during commission of a felony; class B felony.

(a) A person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony.

Possession of a deadly weapon during commission of a felony is a class B felony.

State, Del. Supr., 343 A.2d 613 (1975), this Court sustained a weapon possession charge where a loaded rifle and handgun were found less than 25 feet from the place where the narcotic drugs were discovered. By contrast, we find that the evidence in this case clearly failed to establish the required nexus between the underlying felony and the location of the weapon.

Although Gardner was arrested outside his residence, it may be assumed, based on the jury's verdict on the trafficking count, that there was sufficient evidence to establish, beyond a reasonable doubt, that Gardner's dealings with Krolick on October 10 constituted trafficking in cocaine.[6] The only evidence of what transpired between Krolick and Gardner inside the Gardner residence was elicited from Krolick's testimony at trial. Krolick testified that he went inside, held a discussion with Gardner, took money from his pocket to purchase drugs but then decided to back out of the transaction. He then returned to Levy and was arrested. When police later searched the Gardner residence, they found drugs in a bag near a stairway in the living room and drug paraphernalia in the basement but no drugs or paraphernalia in the bedroom where the weapons were seized.

The State argues that since there was evidence that drugs had probably arrived at the Gardner residence the previous day, and Krolick had secured a sample of cocaine the previous day, Gardner's possession of drugs was continuous and the revolver was thus accessible to him during this continuum. While such evidence may be suffi-

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[6]Gardner was also convicted of the felony of maintaining a dwelling for the keeping of narcotic drugs in violation of 16 *Del.C.* § 4755(a)(5). The State, however, did not charge him with possessing a weapon during the commission of that felony.

cient to support probable cause in a search warrant application, it is significantly short of the quantum necessary to sustain a conviction under the "physically available and accessible" test of Mack. There is no evidence that the drugs seized were ever in the bedroom or that the bedroom was the scene of drug trafficking. To the extent that the drug trafficking may be said to have a *locus*, it may be argued that the entire residence was the location of that felony. Nevertheless, it could not credibly be contended that weapons found anywhere in the Gardner residence could form the basis for a charge under section 1447. Indeed, the State's failure to pursue an indictment for weapons found outside the bedroom is a tacit concession that the trafficking was not co-extensive with the entire residence.

The clear legislative policy supporting the enactment of section 1447 is "to discourage the *accessibility* of a deadly weapon during the commission of a crime, thus reducing the probability of serious harm to the victim." *Mack v. State*, 313 A.2d at 322 (emphasis in original). We recognize that in the context of illegal drug activity, that policy may be extended to include the protection of persons involuntarily exposed to drug activity, particularly police officers. But the automatic compounding of drug felonies through the use of section 1447 charges whenever a weapon is found in the general vicinity of a defendant charged with a drug-related felony is illogical and, as a matter of fundamental fairness, indefensible. There is no suggestion in this case that the safety of the arresting officers was ever at risk by the presence of any guns in the residence once Gardner had been placed in custody outside that residence. Indeed, with Gardner securely in custody, handcuffed and taken into the residence where he was seated in the living room, it is indisputable that any

weapon in the bedroom was not physically accessible to him.

We conclude that the required evidentiary nexus of physical accessibility between the weapon and Gardner's engaging in the underlying felony of drug trafficking is insufficient as a matter of law. Accordingly, his conviction on the charge of possession of a deadly weapon during the commission of a felony must be reversed.

In summary, we AFFIRM the defendant's conviction on all charges except the charge of possession of a deadly weapon during the commission of a felony. As to that charge we REVERSE.

APPENDIX B.

IN THE
SUPERIOR COURT OF THE STATE
OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

v.

MICHAEL GARDNER
Defendant.

Before HON. RICHARD S. GEBELEIN, J.,
and a jury.

Appearances Jeffrey Bartels, Esq., Deputy Attorney General for the State.
Louis B. Ferrara, Esquire, for the Defendant.

Excerpts of Trial Transcript
March 7, 1988

THE COURT: In reviewing the notes that I've taken of the evidence, there are obviously a number of different issues that are raised by the motions.

The first issue relates to the probable cause to arrest the defendant, and I guess also the probable cause similarly to search his premises, whether that is sufficient.

While most of the testimony has focused on the transaction that day, there are some things I think that are important to note from the affidavit from the search warrant.

There is information in there which has been characterized as being stale. Were this information being used for the purposes of getting a search warrant based solely upon its independent value, there's no question that it would be stale. But I note, for example, in Paragraph 5 of the search warrant application, probable cause sheet, the incidents of information about drug sales being—taking place at the Gardner's residence daily, that it relates to the drugs coming from New York and the drugs coming on Thursdays and Fridays. Again, in July of '85, there was purportedly a drug buy at the residence. It doesn't tie to this defendant, but it does indicate that there was a drug buy made at the residence monitored by the police.

There were confidential tips received from Crimestoppers in December of '85. Again, one of the interesting things is that those tips related to drugs coming from New York.

There's a paragraph in the warrant dealing with the confidential informant coming to Trooper Ryser in September indicating that there were still drug sales going on at this residence, and the drug sales were going on primarily on Thursdays and Fridays, because that's when the deliveries were coming in.

While each piece of that doesn't seem to tell you too much, it does seem to show a consistency of information. And there's no indication whatsoever that that information was all coming from one source. So there are a lot of different sources telling you the same type of information.

Getting to the day in question, you have a situation where the police, through a confidential informant, are trying to set up a buy through a third party. That third party accepts the money from the police, then goes to the Gardner residence and comes back and says that Mr. Gardner wasn't in, but that he'll be back at 12:30. I think that's a little bit significant, because then he goes and has lunch with a confidential informant and goes back after 12:30 and, in fact, Mr. Gardner is there. All of these actions by this third party are being conducted under surveillance. It's clear that he did go on the earlier occasion to the Gardner house, that after lunch he does go back to the Gardner house and go into the Gardner house. It's then that he comes back out and returns to the confidential informant and says that the deal is done, he wants the rest of the money to go back, and it's at that time that the arrest is effectuated on him.

At that point in time, it's revealed to the police by a search of that individual that he didn't actually have any drugs. Rather, he still had the $2,000. I don't think that that indicates, necessarily, that what he was doing was engaging in ripoff, or that there was no grounds to believe that he wouldn't take the money back to the house.

In addition to the fact that he has said that he had arranged for the deal and that he wanted the money, you also have a situation where surveillance on a house shows Mr. Gardner waiting outside, and that is a little unusual. The activity does add something to it. At this point in time, they had to make a decision as to exactly what to do.

And as I read the testimony that I've heard, it's at this point in time that they contacted a magistrate to determine whether or not there was probable cause for a search warrant to issue.

When we talk about exclusionary rules, we are talking about rules that are court-created, designed to deter unlawful police contact—or conduct.

My reading of this would be that what was happening was, the police were looking at making a decision to minimize their intrusion. If in fact the magistrate said to them that there's no probable cause, then that probably would have been the end of the thing. That's not what they were told. They were told that there was probable cause, that the magistrate would sign the warrant, and it was at that time that they arrested Mr. Gardner and secured the house.

As to the separate step of going into the house with the SWAT team and securing the house, there is evidence that the house was—or could be occupied by two people. There were two people's names on the bills. There's some question in my mind as to how the unwitting third party would have known to come back at 12:30, unless he had talked to somebody at the house. That is not terribly clear from the evidence. But there's no reason not to believe that the police suspected that there may be another individual in the house. Certainly, they could secure the house from the outside and prevent any entry. They had Mr. Gardner in custody, but that doesn't end the question. Drugs is what they were looking for, and it's very easy to destroy drugs by putting them in the toilet and disposing of them. If there was someone in the house, that is a likely result of watching a SWAT team arrest the other individual on the front lawn.

So, the securing the house I deem to be proper under those circumstances.

At that time, again from the testimony that I've heard in this court, there's no evidence that anyone on the SWAT team seized anything, made any notes, made any comments as to anything in the house. They went through the house looking for individuals and then announced that it was clear and left. The defendant was taken inside the house and kept in custody by the officers who then waited before beginning their search until a search warrant was procured.

With regard to that, there are several additional comments that I think should be made. One is that if we were to say that there were not probable cause, even initially, I think that the Leon case would justify the police conduct in executing the search warrant, once it had issued. And the reason for that is that there was a magistrate who passed on the evidence. Whether it was the same magistrate or not is not entirely clear from the testimony. My guess is that it was a different magistrate who ultimately issued the warrant than the one first talked to. When the officer was testifying, it seemed to me that he was very sure that he talked to Magistrate Brittingham. He was less sure that it was Brittingham that issued the warrant, but he thought they were the same person, the person he talked to, the one who actually issued the warrant.

My own inclination is to believe that he talked to Brittingham and that McLaughlin issued the warrant. But in any event, even if it was the same magistrate involved, the fact that he had been given the probable cause over the telephone does not necessarily destroy his impartiality. In fact, again, I think what the police were doing is attempting to minimize any intrusive effort that they might have had. So the evidence that would have

been seized, pursuant to the search warrant, would be admissible under good faith exception to the exclusionary rule, even were there not to be probable cause for the arrest and the search in the first place. So I'm going to deny the motion to suppress.